

JUL 10 2003

Gwaduri v. INS, No. 02-70629
O'SCANNLAIN, Circuit Judge, dissenting.

CATHY A. CATTERSON
U.S. COURT OF APPEALS

The court is correct that we retain jurisdiction to review due process challenges where the petitioner “allege[s] at least a colorable constitutional violation.” *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir, 2001). “Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985).

In order to facilitate its consideration of ineffective assistance claims, the Board of Immigration Appeals has imposed the so-called “*Lozada* requirements,” which mandate that aliens advancing such a claim to provide the board with

1) an affidavit explaining the agreement with his prior counsel regarding his legal representation; 2) evidence that prior counsel has been informed of the allegations of ineffective assistance and given the opportunity to respond; and 3) either a showing that a complaint against prior counsel has been filed with the proper disciplinary authorities or an explanation of the reasons why not.

Ontiveros-Lopez v. INS, 213 F.3d 1121, 1123 (9th Cir. 2000). While it is undisputed that Gwaduri did not comply with the second and third of these requirements, the majority nevertheless holds that this a case in which “the facts are plain on the face of the administrative record,” and thus “the requirements of *Lozada* are not dispositive.” *Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir.

2003). I respectfully disagree.

The crux of Gwaduri's ineffective assistance claim is that (1) Asherson failed meaningfully to prepare him for the hearing; (2) Asherson mistakenly told him that he should deny ever being convicted; and (3) Asherson erroneously answered "no" on Gwaduri's most recent application. Only the third allegation is substantiated in the administrative record: Asherson himself admitted that the submission of the form was his fault, and the IJ specifically stated that he wouldn't hold it against him. The other two allegations are unsubstantiated – despite the majority's herculean efforts to tease out evidence of the first from Gwaduri's at times rambling testimony – and would, one suspects, be vigorously denied by Asherson. Thus, *Lozada*'s second requirement would indeed have aided the Board's consideration of Gwaduri's claim – indeed, it is difficult to see how it could effectively consider the claim without hearing Asherson's side of the story. Asherson's other efforts on behalf of Gwaduri – including the procurement of both a skilled worker visa and an expungement of his conviction – seem to be nothing short of exemplary, or at least far from constitutionally deficient. As such, Gwaduri has not set forth facts sufficient to demonstrate the kind of "clear and obvious case of ineffective assistance" that this court has required before waiving the *Lozada* requirements. *See Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002).

Even were I in agreement with the majority's conclusion that the requirements are properly waivable here, it is far from clear that Gwaduri has been prejudiced by Asherson's alleged ineffective assistance. As noted above, the three principal allegations concern Asherson's failure to prepare Gwaduri, the submission of the false immigration form, and the advice that Gwaduri deny having been convicted. The failure to prepare, it seems to me, is the strongest of Gwaduri's claims. Even that, however, comes up short. For, as the government notes in its brief, the only preparation Gwaduri needed was to be told to be truthful. Indeed, the IJ seemed most concerned with Gwaduri's alleged lies concerning his 1993 application, which long predated Asherson's representation.

Because I believe that the *Lozada* requirements are not properly waivable here and that, even if they were, Gwaduri has not established prejudice, I respectfully dissent.